BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re:	)	
	)	Docket No. 2004-316-C
Petition to Establish Generic Docket to	)	
Consider Amendments to Interconnection	)	
Agreements Resulting From Changes of Law	)	
	)	

BELLSOUTH TELECOMMUNICATIONS, INC'S
PROPOSED ORDER

The Public Service Commission of South Carolina ("Commission") convened this docket in response to a Petition, filed by BellSouth Telecommunications, Inc. ("BellSouth"), requesting a generic docket to address change of law issue arising from various decisions of the Federal Communications Commission ("FCC").[1] The Commission held a hearing in this docket on October 18, 2005, and the parties subsequently filed post-hearing briefs and/or proposed orders. Having carefully reviewed the record in this matter and the applicable law, the Commission enters this order ruling on the issues that are before the Commission in this proceeding.

PROCEDURAL BACKGROUND

On August 21, 2003, the Federal Communications Commission ("FCC") released its *Triennial Review Order,* or *TRO*,[2] in which it modified incumbent local exchange carriers'

[1] See *Order Granting Joint Motion and Adopting Procedural Schedule,* Order No. 2005-343 in Docket No. 2004-316-C at 1 (June 20, 2005).

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; and Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98 and 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* 18 FCC Rcd 16978 (2003), corrected by *Errata*, 18 FCC Rcd 19020 (2003), vacated and remanded in part, aff'd in part,

("ILECs") unbundling obligations under Section 251 of the federal Telecommunications Act of 1996 ("the Act").[3] Subsequent orders further clarified the scope of ILECs' Section 251 unbundling obligations. These orders culminated in the permanent unbundling rules the FCC released with its *Triennial Review Remand Order*, or *TRRO*, on February 4, 2005.[4] The FCC's new rules removed, in many instances, significant unbundling obligations formerly placed on ILECs, and set forth transition periods for carriers to move the embedded base of these former unbundled network elements ("UNEs") to alternative serving arrangements. The *TRRO* explicitly requires change of law processes and certain transition periods to be completed by March 10, 2006.[5]

BellSouth has entered into over 150 commercial agreements through which BellSouth satisfies its Section 271 switching obligation.[6] Some of CompSouth's member companies have entered into commercial agreements with BellSouth.[7] In addition, over 99 competitive local exchange carriers ("CLECs") in South Carolina have amended or entered into new Section 252 interconnection agreements that reflect the new unbundling rules regarding elements that remain subject to State commission oversight.[8]

United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied,* 125 S. Ct. 313 (2004) (referred to, interchangeably, as the "*Triennial Review Order*" or the "*TRO*").

[3] The *Telecommunications Act of 1996* amended the *Communications Act of 1934*, 47 U.S.C. § 151 et seq. References to "*the Act*" refer collectively to these Acts.

[4] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) (referred to, interchangeably, as the "*Triennial Review Remand Order*" or the "*TRRO*").

[5] *See TRRO*, ¶¶ 143, 144, 196, 197, and 227.

[6] Tr. at 113.

[7] Tr. at 539-540.

[8] Tr. at 113.

While some CLECs operating in South Carolina have successfully negotiated the changes necessitated by the *TRO* and the *TRRO,* there are other CLECs with whom discussions continue and still other CLECs that have not negotiated with BellSouth to modify interconnection agreements to reflect current regulatory policy.[9]

I. 271-Related Issues (Issues 8, 14, 17, 18, 22)

The most contentious, and arguably the most important, issues in this generic docket involve the interplay between Section 271 of the Act and de-listed UNEs.[10] BellSouth argues that once an element has been de-listed, the FCC has exclusive jurisdiction over BellSouth's provisioning of that element. The CLECs, on the other hand, argue that even after an element has been de-listed, Section 271 of the Act requires BellSouth to continue providing that element by way of an interconnection agreement that is subject to the negotiation, arbitration, and approval process set forth in Section 252 of the Act. In deciding the 271-related issues, the Commission has carefully considered the relevant federal statutes, FCC Orders, court decisions, and other State commission decisions.[11]

A. **Issue 8(a):** *Does the Commission have the Authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?*

Section 271 of the Act addresses BellSouth's authority to provide interLATA services. This section provides, in relevant part, that BellSouth "meets the requirements of this

---

[9] Tr. at 6, 123-124.

[10] As used in this Order, "de-listed UNEs" refers to elements that, as a result of various FCC decisions, BellSouth is no longer required to offer on an unbundled basis under Section 251 of the federal Act.

[11] In addition to federal law, South Carolina law also imposes certain unbundling obligations upon BellSouth. The relevant statute, however, expressly states that such obligations "shall be consistent with applicable federal law . . . ." S.C. Code Ann. §58-9-280(C). Deciding these issues in compliance with federal law, therefore, is both consistent with and required by applicable state law.

subparagraph if it has entered into one or more binding agreements that have been approved under Section 252 [of the Act] . . . ."[12] The CLECs' rely heavily on this language to support their argument that the negotiation, arbitration, and approval process set forth in Section 252 of the Act applies to de-listed UNEs.[13] To resolve the 271-related issues, therefore, the Commission must determine what Section 252 of the Act does and does not require in an interconnection agreement.

The Commission first notes that Section 252 makes no reference whatsoever to Section 271 of the Act.[14] Instead, Section 252 of the Act applies when BellSouth "receiv[es] a request for interconnection, services, or network elements pursuant to Section 251 [of the Act] . . . ."[15] A State commission is required to approve an interconnection agreement that is reached as a result of negotiations unless the agreement either (1) discriminates against a carrier that is not a party to it; or (2) is not consistent with the public interest, convenience, and necessity.[16] On the other hand, if the Commission is required to arbitrate an interconnection agreement, the Commission must approve the agreement unless it either (1) does not meet the requirements of Section 251 of the Act; or (2) does not meet the standards set forth in Section 252(d) of the Act.[17] Section 252(d), in turn, sets forth pricing standards that apply to: rates for interconnection or network elements required by subsections (c)(2) and (c)(3) of Section 251;[18] BellSouth's compliance with

---

12 47 U.S.C. §271(c)(1)(A).

13 Tr. at 454.

14 The CLECs argue that the fact that Section 252 makes no reference to Section 271 is "immaterial." *See CompSouth's Response to BellSouth's Motion for Summary Judgment or Declaratory Ruling and CompSouth's Cross-Motion for Summary Judgment and Declaratory* at p. 8. The Commission, however, is not willing to summarily disregard this significant omission.

15 47 U.S.C. §252(a)(1).

16 *Id.,* §252(e)(2)(A).

17 *Id.*, §252(e)(2)(B).

18 *Id.*, §252(d)(1).

the reciprocal compensation requirements of Section 251(b)(5);[19] and rates for services that are resold pursuant to Section 251(c)(4).[20]

Section 252 also allows a State commission to review any statement of the terms and conditions BellSouth generally offers to CLECs ("SGAT")[21] that BellSouth may file with a State commission, in order to determine whether the SGAT complies with Section 251.[22] Finally, Section 252 provides that if a State commission fails to carry out its duties under Section 252 and the FCC steps in to fulfill those duties, an aggrieved party may bring an action in the appropriate federal court to determine whether the interconnection agreement or SGAT approved by the FCC "meets the requirements of Section 251 and this section."[23] Clearly, Congress limited the Section 252 rate-setting, negotiation, arbitration, and approval process to Section 251 obligations.[24]

---

[19] *Id.,* §252(d)(2)(A).

[20] *Id.,* §252(d)(3).

[21] These statements often are called SGATs, which stands for "statement of generally available terms."

[22] *Id.*, §252(f)(1),(2).

[23] *Id.*, §252(e)(6).

[24] This conclusion is consistent with the FCC's statement that "[w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to Section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements." *TRO* at ¶ 656 *See also Id.* at ¶657 (stating that this Section "is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required under Section 271"). It also is consistent with federal court rulings. *See Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.,* 350 F.3d 482, 488 (5th Cir. 2003) ("An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252."); *MCI Telecom. Corp. v. BellSouth Telecommunications, Inc.,* 298 F.3d 1269, 1274 (11th Cir. 2002) (holding that a requirement that an ILEC like BellSouth negotiate items that are outside of Section 251 is "contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.").

In sharp contrast to Section 252, which authorizes State commissions to make certain decisions regarding Section 251 elements, Section 271 vests authority to address network elements that are provided pursuant to that section exclusively with the FCC. A Bell operating company ("BOC") like BellSouth, for instance, may apply to the FCC for authorization to provide long distance services, and the FCC has exclusive authority for "approving or denying" that authority.[25] Similarly, once a BOC like BellSouth obtains Section 271 authority (as BellSouth has done in South Carolina), continuing enforcement of Section 271 obligations rests solely with the FCC under Section 271(d)(6)(A) of the Act. The plain language that Congress used in the Act, therefore, demonstrates that elements that BellSouth is required to offer pursuant to Section 251 of the Act are subject to the Section 252 process. In contrast, elements that BellSouth is not required to offer pursuant to Section 251, but that it is required to offer pursuant to Section 271, are subject to the exclusive jurisdiction of the FCC.

This conclusion is buttressed by the plain language of various FCC Orders. When the FCC first addressed the interplay between Section 251(c) and the competitive checklist network elements of Section 271 in its *UNE Remand Order,* the FCC made it clear that "the prices, terms, and conditions set forth under Sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of Section 271."[26] Instead, the FCC stated that

> [i]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in Section 251(d)(2),

---

[25] 47 U.S.C. § 271(d)(1),(3).

[26] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 469 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

> the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a).[27]

Subsequently, in its *TRO*, the FCC made it clear that the prices, terms, and conditions of Section 271 checklist item elements, and a BOC's compliance with them, are within the FCC's exclusive purview in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6). In that Order, the FCC stated that "[i]n the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271 . . . ."[28] In the FCC's words, it is the FCC that has "exclusive authority" over the entire "Section 271 process."[29] Clearly, the FCC refused to graft the requirements of Sections 251 and 252 onto Section 271 in its *TRO.* The D.C. Circuit Court of Appeals upheld this decision, characterizing the CLEC's suggested cross-application of Section 251 to Section 271 as "erroneous."[30] Moreover, in the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BellSouth's compliance with Section 271.[31]

The FCC also has held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 of the Act, and these sections are applied and enforced by the

---

[27] *UNE Remand Order* at ¶470.

[28] *TRO* at ¶ 665. *See also TRO* at ¶ 663. ("The Supreme Court has held that the last sentence of Section 201(b), which authorized the [FCC] 'to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' empowers the [FCC] to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996. Section 271 is such a provision.") (citations omitted).

[29] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona,* 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999).

[30] *United States Telecom. Ass'n v. FCC*, 359 F.3d 554, 590 (D.C. Cir 2004).

[31] *See SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

FCC.[32] Section 201, for instance, speaks in terms of "just and reasonable" rates, and those are determinations that "Congress has placed squarely in the hands of the [FCC]."[33] As the D.C. Circuit has noted, Sections 201 and 202 "authorize the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory."[34]

In light of this authority, at least three federal courts have found that it is not appropriate to address Section 271 issues in the context of the Section 252 arbitration process. On appeal from a decision from the Mississippi Public Service Commission on the "new adds" issue, for instance, the United States District Court in Mississippi explained:

> Even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may (i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company ... or (iii) suspend or revoke such company's approval to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any

---

[32] *See TRO* at ¶664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake …."); also *TRO* at ¶ 665 ("In the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271.").

[33] *In Re: Long Distance Telecommunications Litigation,* 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D. D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd*., 99 F.3d 448 (D.C. Cir. 1996).

[34] *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996). The idea of FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel, given that the Supreme Court has determined that Congress "unquestionably" took "regulation of local telecommunications competition away from the States" on all "matters addressed by the 1996 Act" and required that State commission regulation be guided by FCC regulations. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999); *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004).

> statutorily imposed conditions to its continued provision of long distance service.[35]

Similarly, the United States District Court in Kentucky confirmed that:

> While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.[36]

Finally, a federal district court in Montana has held that Section 252 did not authorize a State commission even to approve a negotiated agreement for line sharing between Qwest and Covad. The federal court reasoned that Section 252 did not apply to this "commercial agreement" because line sharing "is not an element or service that must be provided under Section 251."[37] If Section 252 does not allow a State commission to even approve a negotiated agreement that does not involve Section 251 items, it certainly does not allow a State commission to arbitrate terms that are not mandated by Section 251.

The Commission also notes that several State commissions have concluded, in some form or fashion, that the FCC, rather than State commissions, is charged with Section 271

---

[35] *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, 368 F.Supp. 2d 557, 566 (S.D. Miss. 2005) ("*Mississippi Order*").

[36] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al*., Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order*, (E.D. Ky. Apr. 22, 2005) ("*Kentucky Order*"), p. 12 of slip opinion; The foregoing decisions are consistent with *Indiana Bell v. Indiana Utility Regulatory Com'n et al.,* 359 F.3d 493, 497 (7th Cir. 2004) (*"Indiana Bell"*), in which the Seventh Circuit described a State commission's role under Section 271 as "limited" to "issuing a recommendation." Consequently, when the Indiana Commission attempted to "parlay its limited role in issuing a recommendation under Section 271" into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service, the Seventh Circuit preempted that attempt.

[37] *Qwest Corp. v. Schneider, et al.*, 2005 U.S. Dist. LEXIS 17110, CV-04-053-H-CSO, at 14 (D. Mont. June 9, 2005).

oversight.[38] These decisions are consistent not only with applicable federal law, but also with sound public policy. The FCC and the courts undeniably have found that overbroad unbundling obligations have hindered the innovation and investment that results from sustainable facilities-based competition.[39] As this Commission has held, "[t]he FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest."[40] It would be exceedingly odd for all of the FCC's decisions, deliberations, and conclusions about the adverse impact of the de-listed UNEs on competition under Section 251 of the Act to be rendered moot

---

[38] *In re: Petition for Arbitration of Covad with Qwest,* Docket No. UT-043045, Order No. 06 (Feb. 9, 2005), *2005 Wash. UTC LEXIS 54*; *In re: Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005), *2005 Utah PUC LEXIS 16*; *In re: Petition for Arbitration of Covad with Qwest,* Iowa Utilities Board, Docket No. ARB-05-1 (May 24, 2005), *2005 Iowa PUC LEXIS 186;* Order No. 29825; *2005 Ida. PUC LEXIS* 139; *In re: Petition for Arbitration of Covad with Qwest,* South Dakota Public Service Commission Docket No. TC05-056 (July 26, 2005), *2005 S.D. PUC LEXIS 13; In re: Petition for Arbitration of Covad with Qwest,* Oregon Public Utility Commission, Order No. 05-980, ARB 584 (Sept. 6, 2005), *2005 Ore. PUC LEXIS 445; Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc., et al;* R-00049524; R-00049525; R-00050319; R-00050319C0001; Docket No. P-00042092, 2005 Pa. PUC LEXIS 9 (June 10, 2005); *In re: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* D.T.E. 04-33, Arbitration Order (July 14, 2005); Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005; Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas P.U.C. Docket No. 28821* (June 17, 2004) ("Texas Order"); July 28, 2005 order in Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18; Memorandum Opinion and Order,* October 31, 2005, *In re: Petition of Southwestern Bell Telephone L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for Successor Interconnection Agreement to the Arkansas 271 Agreement,* Docket No. 05-081-U; *Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief*, Alabama Public Service Commission Docket No. 29393 (May 25, 2005) ("May 25, 2005 Order"), at p. 18; *Order Concerning New Adds,* North Carolina Utilities Commission, Docket No. P-55, Sub 1550, April 25, 2005, at p. 13; *See also Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's TRO on Remand*, New York Public Service Commission Case No. 05-C-0203 (March 16, 2005).

[39] *See, e.g., TRRO* ¶¶ 2, 8 (*citing to United States Telecom Ass'n v. FCC,* 290 F.2d 415, 418-21 (D.C. Circ. 2002) (*"USTA I").*

[40] *Order Addressing Petition for Emergency Relief,* Order No. 2005-247 in Docket No. 2004-316-C at 5 (Aug. 1, 2005)

by allowing CLECs to obtain the exact same arrangements pursuant to Section 271 of the very same act.

For all of the reasons set forth above, the Commission concludes that the answer to this question presented by Issue 8(a) is "no." The Commission further finds that the contract language proposed by BellSouth is consistent with this conclusion, and the contract language proposed by the CLECs is not. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A including without limitation Section 1.1, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

B. **Issue 8(b): Section 271 and State Law:** *If the answer to part (a) is affirmative in any respect, does the Commission have the Authority to establish rates for such elements?*

Given that the Commission has answered part (a) in the negative, this issue is moot. Even if it were not, the Commission notes that Section 271 "establish[es] a comprehensive framework governing Bell operating company (BOC) provision of 'interLATA service.'"[41] The role of a State commission in that process is to "consult" with the FCC, so that the FCC may verify that a BOC applying for permission to provide interLATA service under Section 271 has complied with the requirements of Section 271(c).[42] While Congress could have provided that State commissions would set rates for both Section 251 elements and separately for purposes of the competitive checklist contained in subsection (c)(2)(B) of Section 271, it plainly did not. As the FCC has explained regarding the relationship between Sections 251 and 271, "Congress'

[41] *E.g.*, Memorandum Opinion and Order, *Petition of SBC Communications for Forbearance,* 19 FCC Rcd 5211, ¶ 7 (2004).

[42] *See* 47 U.S.C. §271(d)(2)(B).

decision to omit cross-references [is] particularly meaningful" in this context, given that such cross-references are plentiful elsewhere in the relevant provisions.[43]

Moreover, the FCC has clearly ruled that it is federal law – namely, Sections 201 and 202 – that established the standard that BOCs must meet in offering access to Section 271 elements.[44] As explained above, these sections are applied and enforced by the FCC, which has stated unequivocally that it has "exclusive authority" over "the Section 271 process."[45] The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.1, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

C. **Issue 8(c): Section 271** *If the answer to 8(a) or (b) is affirmative in any respect,(i) what language, if any, should be included in the ICA with regard to the rates for such elements; and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?*

Given that the Commission has answered 8(a) and (b) in the negative, this issue is moot. Even if it were not, the Commission would deny the CLECs' requests to establish "interim" rates for elements that are no longer required to be unbundled pursuant to Section 251 of the Act. As the FCC has explained in appellate papers it filed in the D.C. Circuit Court of Appeals:

> The CLECs dispute the [FCC's] finding that unbundled mass market switching creates investment disincentives. They contend that TELRIC rates are much higher than the [FCC's] analysis suggests. The CLECs' characterization of TELRIC rates is just not credible. If (as the CLECs assert) TELRIC switching rates are at or above "the upper end" of a "just and reasonable range", then presumably CLECs would have stopped paying high UNE rates and started serving their mass market customers with the switches they had already purchased and deployed to serve enterprise customers.

---

43 *See* TRO at ¶657.

44 *See TRO* at ¶ 656; *UNE Remand Order* at ¶ 470; *USTA II,* 359 F.3d at 588-90.

45 *See US West Order*, 14 FCC Rcd at 14401-02, ¶ 18.

* * *

> The CLECs question the reasonableness of *any* rate increase. They assert that rates for unbundled switching were already at or above the "high end" of "the just and reasonable range" before the FCC prescribed the interim rate increase ... The CLECs' own conduct is inconsistent with their claim that TELRIC-based switching rates are high or excessive. The CLECs continued to pay TELRIC rates even though the could have served their mass market customers with non-ILEC switches that they had already purchased and deployed to serve enterprise customers. Competitors' persistent reliance on UNE-P - even after extensive deployment of competitive switches – provides powerful evidence that TELRIC-based switching rates were not even close to "the high end" of the permissible range of rates under the "just and reasonable" standard of Section 201(b).[46]

Clearly, pricing Section 271 elements at, or close to TELRIC, would inappropriately perpetuate the investment disincentives that existed under the UNE-P regime.

This would not be an appropriate result. As the Eleventh Circuit stated in rejecting the CLECs' position on the "no new adds" issue, "the CLECs are clinging to the former regulatory regime in an attempt to cram in as many new customers as possible before they are forced to bow to the inevitable, but their argument contravenes the clear intent of the *TRRO.*"[47] Similarly, the CLEC's request for interim rates for Section 271 elements contravenes clear federal law and is denied. The Commission, therefore, finds that the contract language it has ordered with respect to Issue 8(a) above is sufficient to address this issue. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.1, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

---

[46] See Hearing Exh. 12, *Brief of the FCC,* Respondents, United States District Court of Appeals, District of Columbia Circuit, Case No. 05-1095, pp. 32, 36 (citations omitted), *oral argument scheduled* Feb. 26, 2006.

[47] *BellSouth Telecommunications, Inc. v. MCI Metro Access Tranmission Svcs,* 425 F.3d 964, 970 (11th Cir. 2005).

D. **Issue 14: Commingling:** *What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)*?

The FCC defines "commingling" as "the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements with one or more such facilities or services."[48] The CLECs argue that this rule allows them to purchase a UNE under Section 251 (a loop, for instance), "commingle" it with an element they purchases under Section 271 (switching, for instance), and pay a rate that is established under the Section 252 process for that "commingled" offering. In the context of a loop and a port, this would allow CLECs to continue purchasing the loop-port combination that formerly was called the UNE-P pursuant to interconnection agreements that are subject to the Section 252 process, even though the FCC has found that the UNE-P harms competition and that CLECs are not impaired in their ability to obtain switching ports from other sources. For the reasons set forth below, the Commission finds that the CLECs' arguments are without merit.

First, as explained above, the Commission finds that the FCC has exclusive jurisdiction over elements that BellSouth is required to provide under Section 271. Even if that were not the case, however, a careful review of controlling authority demonstrates that BellSouth has no obligation to commingle Section 251 items with Section 271 items. Although the FCC enacted its federal commingling rule in connection with the *TRO,* the term "commingling" was first used

[48] 47 C.F.R. § 51.5

in the FCC's *Supplemental Order on Clarification* ("*SOC*").[49] There, the FCC discussed commingling as combining loops or loop-transport combinations with tariffed special access services.

> We further reject the suggestion that we eliminate the prohibition on "commingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.[50]

By using the phrase "i.e.", which commonly means, "that is," the FCC in the *SOC* understood commingling as referring to a service combination that expressly included tariffed access services.

The FCC's discussion of commingling in the *TRO* was ultimately consistent with its discussion in the *SOC* as explained more fully below. In the *TRO*, the FCC explained that commingling meant

> the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.[51]

Thus, contrary to the CLECs' argument that there is a distinction between an ILEC's commingling obligation and the combination obligation,[52] the FCC used the terms interchangeably.

---

[49] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, ¶28 (2000), aff'd sub nom. *Comptel v.* FCC, 309 F.2d 3 (D.C. Cir. 2002).

[50] *SOC* at ¶ 28

[51] *TRO,* ¶ 579.

[52] *See* Tr. at 458-460. CLEC witness Gillan's testimony on this point is puzzling. He describes the FCC's use of the terms combining and commingling as a matter of "semantic construction," claims BellSouth is "not technically required to 'combine' § 271 elements," then claims BellSouth has an obligation to "connect § 271 elements." Tr. at 458-459. In the context of this issue, the Commission can discern no distinction between "connect" (which Mr. Gillan prefers) and "combine." The definition of commingling at 47 C.F.R. §51.5 includes "the

The FCC very clearly "decline[d] to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251."[53] This aspect of the FCC's ruling was upheld on appeal, and the appellate court explained that the FCC had "decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements."[54]

This conclusion is clear from the history of the language that appears in the *TRO.* As originally issued, the FCC's *TRO* stated:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements ***unbundled pursuant to Section 271*** and any services offered for resale pursuant to Section 251(c)(4) of the Act.[55]

Had this language remained intact, the CLECs' argument might have merit. The FCC, however, subsequently issued an *Errata* deleting the phrase "unbundled pursuant to Section 271" from this sentence.[56] Thus, the language of the *TRO,* as corrected by the *Errata*, requires

> incumbent LECs [to] permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements and any services offered for resale pursuant to Section 251(c)(4) of the Act.

---

combining of an unbundled network element … with one or more such facilities or services." Since Mr. Gillan testifies that BellSouth is not required to "combine" § 271 elements, and the definition of commingling includes the obligation of combining a UNE with other facilities or services, Mr. Gillan appears to effectively concede that BellSouth has no obligation to commingle § 271 network elements with UNEs.

[53] *See TRO* at ¶ 655, n. 1989 The *TRO,* as originally issued, had this language at note 1990. After the *TRO Errata* the footnotes were renumbered, and the language appears at note 1989.

[54] *USTA II,* 359 F.3d at 589. Significantly, the Section 271 checklist obligates BellSouth to provide local loop transmission "*unbundled from local switching and other services",* local transport *"unbundled from switching or other services",* and switching "*unbundled from transport, local loop transmission or other services." See* 47 U.S.C. §271(c)(2)(B)(iv)-(vi).

[55] *TRO* at ¶ 584 (emphasis supplied).

[56] *TRO Errata*, 18 FCC Rcd 19020 ¶27 (2003).

Clearly, ILECs like BellSouth are not required to commingle UNEs with elements that are unbundled pursuant to Section 271.

The Commission notes that at the same time the FCC deleted the phrase "unbundled pursuant to Section 271" from its discussion of commingling in paragraph 584 of the *TRO,* it also deleted the sentence, "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to these checklist items" from its discussion in the Section 271 portion of the *TRO.*[57] The CLECs argue that, when read together, the two deletions were intended to correct any potential conflict. The Commission does not agree. Had the FCC desired to impose some type of commingling or combining obligation on BellSouth, it would have only needed to delete the language at footnote 1990, yet retain its original language in paragraph 584, which, as originally issued, appeared to impose an obligation to commingle UNEs with Section 271 network elements. That, however, is not what the FCC did.

Ultimately, by making its deletions, the federal commingling rule issued by the *TRO* became entirely consistent with the discussion of commingling in the *SOC*, because the words wholesale services are repeatedly referred to as tariffed access services. Although the CLECs argue that wholesale services must include Section 271 obligations, the FCC clearly intended to limit the types of wholesale services that are subject to commingling. In describing wholesale services in the *TRO*, the FCC referred only to tariffed access services, just as it had in the *SOC,* explaining, in relevant part, as follows. First,

> We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff).

---

[57] *See TRO,* n. 1989 (prior to the *TRO Errata,* this was footnote 1990).

Next,

> Competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff).

Third,

> We do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.*, a ... circuit at rates based on special access services and UNEs).

Then,

> We require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.

Finally,

> Commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services.[58]

The foregoing passages, along with the deletion of Section 271 in the description of commingling in the *Errata,* show clearly that the FCC never intended to require ILECs to commingle Section 271 elements with Section 251 UNEs. Moreover, language within the *TRRO,* read in conjunction with the *TRO,* is consistent with this conclusion. In addressing conversion rights in the *TRO,* the FCC referred to "wholesale services," concluding, "Carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations ...."[59] Then, when describing this conversion holding in the *TRRO*, the FCC explicitly limited its discussion to the conversion of tariffed services to UNEs: "We determined in the *TRO* that competitive LECs may convert tariffed incumbent LEC

---

[58] *TRO at* ¶¶ 579 – 581, 583.

[59] *TRO* at ¶ 585 (emphasis supplied).

services to UNEs and UNE combinations ...."[60] Clearly, the FCC narrowly interprets "wholesale services" as limited to tariffed services, and it does not expect or require BellSouth to combine or commingle Section 271 network elements with Section 251 network elements. This conclusion is consistent with decisions of the Mississippi federal district court,[61] the Kansas Commission,[62] the New York Commission,[63] the North Carolina Commission,[64] and the Florida Commission.[65]

The Commission, therefore, finds that BellSouth is not obligated to commingle UNEs that are required by Section 251 with items it is required to offer pursuant to Section 271. The Commission finds that the CLECs' proposed contractual language is inconsistent with this finding and that BellSouth's proposed contractual language is consistent with this finding. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order,

---

[60] *TRRO* at ¶ 229 (emphasis supplied).

[61] *BellSouth v. Mississippi Public Serv. Comm'n*, 368 F.Supp. 2d at 565 (stating that the court would agree with the New York Commission's findings that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to 271-based UNE-P arrangements.'") (quoting).

[62] *See Kansas Order* at ¶¶ 13-14 (ruling: (1) Southwestern Bell Texas ("SWBT") was "not under the obligation to include 271 commingling provisions in successor agreements"; (2) "271 commingling terms and conditions had no home in [interconnection] agreements"; and (3) if it ordered SWBT to provide commingling and SWBT refused the commission "would have no enforcement authority against SWBT because that authority resides with the FCC.").

[63] *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (Mar. 16, 2005)

[64] *See* NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 24. ("The Commission believes that … the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.")

[65] FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005)("The FCC's errata to the TRO struck the portion of paragraph 584 referring to '... any network elements unbundled pursuant to Section 271 ....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also required to be unbundled under Section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to Section 271.").

including without limitation Section 1.11, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

E. Issue 17: Line Sharing: *Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?*

"Line sharing" occurs when a CLEC provides DSL service over the same line that BellSouth uses to provide voice service to a particular end user, with BellSouth using the low frequency portion of the loop and the CLEC using the high frequency portion of the same loop.[66] The CLECs argue that line sharing is a Section 271 obligation, and BellSouth disagrees. Significantly, there are no line sharing arrangements between BellSouth and any CLEC in South Carolina,[67] and none of the CLECs witnesses filed testimony that explains their position on this issue. While CompSouth's witness filed contract language addressing the issue, he acknowledges he did not sponsor any testimony to support his proposed contract language.[68]

As explained below, the FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004.[69] BellSouth asks the Commission to implement this aspect of the *TRO* and require CLECs to eliminate line sharing from their interconnection agreements in South Carolina, explaining that to the extent a CLEC has a regionwide agreement and has line sharing arrangements in place, it would need to include language that implements the *TRO's* binding transition mechanism for access to the high

---

66 *See TRO* at ¶255.
67 Tr. at 183.
68 *See* Gillan Deposition at 77.
69 Tr. at 183 (*citing TRO* at ¶¶ 199, 260-262, 264-265).

frequency portion of the loop ("HFPL").[70] The Commission finds that BellSouth's request is both reasonable and appropriate.

The CLECs' argument that line sharing is a Section 271 obligation fails for several reasons. First, the plain language of Section 271 does not require line-sharing. Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."[71] Clearly, when line sharing occurs, transmission, local switching, and other services are being provided.[72] Consequently, requiring line sharing as a Section 271 element would conflict with the statutory language.

Moreover, the FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises.[73] BellSouth thus meets its checklist item 4 obligations by offering access to unbundled loops and the "transmission" capability on those facilities.[74] The Commission rejects the CLECs' argument that because the HFPL is "a complete transmission path," it somehow constitutes "a form of 'loop transmission facility'" under checklist item 4. This argument ignores the portion of the definition of HFPL that defines HFPL as a "complete transmission

---

[70] Tr. at 183.

[71] 47 U.S.C. § 271(c)(2)(B)(iv).

[72] *See*, e.g., *TRO* at ¶255 (explaining that the end user in a line sharing arrangement is receiving both voice and DSL service over the same facility).

[73] 47 C.F.R. § 51.319(a).

[74] The Joint CLECs cite to FCC 271 orders for the proposition that line sharing is a Section 271 obligation. *See In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, 15 FCC Rcd 3953 (Dec. 22, 1999); *In the Matter of Application by SBC Communications, Inc., et al.; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, 15 FCC Rec'd 18354 (June 30, 2000). However, neither Bell Atlantic (now Verizon) in New York nor SBC in Texas were required to offer line sharing to obtain Section 271 approval. If line sharing actually had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted Verizon and SBC Section 271 authority.

path on the frequency range above the one used to carry analog circuit switched voice transmissions …."[75] In other words, the HFPL is only part of the facility – not the entire "transmission path" required by checklist item 4.[76]

The CLECs further argue that despite the clear language of the FCC in its *TRO*, they can obtain the HFPL indefinitely, and at rates other than the ones the FCC specifically established in its transition plan, simply by requesting access to those facilities under Section 271 instead of Section 251. This position is inconsistent with both the statutory scheme and the FCC's binding decisions. First, if for no other reason, the CLECs' argument must fail for the same reason that it fails in response to Issue 8(a).

Second, the CLECs' argument would render irrelevant the FCC's carefully-calibrated transition plan to wean CLECs away from the use of line-sharing and to transition them to other means of accessing BellSouth's facilities (such as access to whole loops and line-splitting) that do not have the same anti-competitive effects that the FCC concluded are created by line-sharing. As the FCC explained, "access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives."[77] Indeed, the FCC expressly found continued unlimited access to line-sharing to be anticompetitive and contrary to the core goals of the 1996 Act, because it would

> likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECS' and the competitive LECs' offerings. We find that such results would run counter to the

---

[75] *TRO,* ¶ 268.

[76] A simple but appropriate analogy makes the point – it is as if one ordered a birthday cake from a bakery but received only the icing. Certainly the buyer would not consider the icing alone a "form" of birthday cake. On the contrary, the requirement was a whole cake, not just a portion of it, just as checklist item 4 requires the entire transmission facility, not just the high frequency portion of the transmission facility.

[77] *TRO* at ¶ 260.

> statute's express goal of encouraging competition and innovation in all telecommunications markets. [78]

The Commission does not believe that the FCC would have carefully eliminated these anti-competitive consequences under Section 251, only to allow them to continue unchecked under Section 271. On the contrary, subsequent FCC orders confirm that it continues to believe that it has required CLECs, in lieu of line sharing, to obtain a whole loop or engage in line-splitting. Thus, in its very recent *BellSouth Declaratory Ruling Order,*[79] the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop."[80] Moreover, far from suggesting an open-ended Section 271 obligation to allow line-sharing, this very recent FCC decision reiterates that line sharing was required "only under an express three-year phase out plan."[81] The FCC's statement cannot be squared with the notion that line-sharing is also required indefinitely under Section 271. Finally, even if Section 271 somehow did require line-sharing, the Commission agrees with and adopts the analysis set forth in BellSouth's brief, which demonstrates that the FCC's recent forbearance decision[82] would have removed any such obligation.

For these reasons, the Commission finds that Section 271 does not require BellSouth to provide line sharing. This decision is consistent with decisions of the Tennessee,[83] Massachusetts,[84] Michigan,[85] Rhode Island,[86] and Illinois Commissions.[87] The Commission

---

78 *Id.* ¶ 261.

79 *See Memorandum Opinion and Order and Notice of Inquiry*, 20 FCC Rcd 6830 WC Docket No. 03-251 (Mar. 25, 2005) ("BellSouth Declaratory Order").

80 (¶ 35).

81 *Id.* ¶ 5 n. 10.

82 *Memorandum Opinion and Order*, 19 FCC Rcd 21496 WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order"*).

83 Docket No. 04-00186, Order dated July 20, 2005.

84 *Massachusetts Arbitration Order,* p. 185.

further finds that the CLECs' proposed contractual language is inconsistent with this decision and that BellSouth's proposed contractual language is consistent with it. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix B to this Order, including without limitation Section 3.1.2, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

F. **Issue 18: Line Sharing – Transition:** *If the answer to Issue 17 is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?*

Having answered Issue 17 in the negative, the Commission finds that the FCC clearly articulated the transitional plan for line sharing at paragraph 265 of the *TRO*:

> The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state- approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the

---

[85] *In re: Application of ACD Telecom, Inc. against SBC Michigan for its Unilateral Revocation of Line Sharing Service in Violation of the Parties' Interconnection Agreement and Tariff Obligations and For Emergency Relief,* 2005 Mich. PSC LEXIS 109, Order Dismissing Complaint * 12-13 (Mar. 29, 2005).

[86] *Report and Order*, 2004 R.I. PUC LEXIS 31, *In re: Verizon-Rhode Island's Filing of October 2, 2003 to Amend Tariff No. 18*, Rhode Island Public Utilities Commission, Docket No. 35556 (October 12, 2004).

[87] *In re: XO Illinois*, 2004 WL 3050537 (Ill. C.C. Oct. 28, 2004).

> incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary.

BellSouth has no obligation to add new line sharing arrangements after October 2004. Accordingly, it is appropriate to properly transition existing line sharing arrangements to other arrangements.

Accordingly, the Commission finds that South Carolina CLECs with regionwide interconnection agreements and that have line sharing customers must amend their interconnection agreements to incorporate both the line sharing transition plan contained in the federal rules and language that requires CLECs to pay the stand-alone loop rate for arrangements added after October 1, 2004. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language and rates addressing this issue as set forth in Appendix B and C to the Order shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

G. Issue 22: Call Related Databases: *What is the appropriate ICA language, if any, to address access to call related databases?*

Pursuant to the *TRO*, BellSouth is not obligated to unbundle call-related databases for CLECs who deploy their own switches.[88] The FCC's rules require BellSouth to provide access to signaling, call-related databases, and shared transport facilities on an unbundled basis only to the extent that local circuit switching is unbundled.[89] This decision applies on a nationwide basis, both to enterprise and mass-market switching.[90] Consequently, interconnection

[88] *TRO* at ¶ 551 ("[w]e find that competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases, with the exception of the 911 and E911 databases as discussed below").

[89] 47 C.F.R. 51.319(d)(4)(i).

[90] *TRO* at ¶ 552.

agreements should not contain any language regarding the provision of unbundled access to call-related databases other than 911 and E911.

The D.C. Circuit affirmed the FCC's decision on call-related databases. On appeal, the CLECs argued that the only reason that alternatives existed to ILEC databases was because the FCC had previously ordered access to such databases.[91] The Court rejected this argument and held that "[a]s it stands, CLECs evidently have adequate access to call-related databases. If subsequent developments alter this situation, affected parties may petition the [FCC] to amend its rule."[92] Because CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases. BellSouth's legal obligation is expressly limited to providing databases only in connection with switching provided under the FCC's transition plan.

The CLECs argue that BellSouth must include language concerning Section 271 access to call-related databases in its interconnection agreements.[93] As noted above, however, the FCC has exclusive Section 271 authority. Moreover, it is unreasonable to assume that the FCC and D.C. Circuit eliminated unbundling requirements for databases only to have such obligations resurrected through Section 271.

CompSouth's proposed language, therefore, must be rejected. BellSouth's proposed contract language concerning call-related databases appropriately ties BellSouth's obligation to provide unbundled access to call related databases to BellSouth's limited obligation to provide switching or UNE-P.[94] The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in

---

91 *USTA II* at 587.
92 *Id.* at 587-88.
93 Revised Exhibit JPG-1 at 50.
94 *See* PAT-1 Section 7.1; Tr. at 332-334.

Appendix A to this Order, including without limitation Section 7, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

II. Transition Issues (2, 3, 4, 5, 9, 10, 11, 32)

The overriding disputes between BellSouth and the CLECs concerning the FCC's transition plan include establishing contract language for an orderly transition and determining whether CLECs can pay UNE rates after they have migrated from Section 251 UNEs to other serving arrangements.[95] In addition, the CLECs seek contract language that would allow them to transition from Section 251 UNEs to Section 271 checklist items.

A. Issue 2: *TRRO* Transition Plan

What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?

Based on the FCC's rulings, the Commission finds that CLECs should not be allowed to wait until the eleventh hour to work cooperatively with BellSouth to establish an orderly transition. The FCC has stated that the transition timeframes it established provide: (1) adequate time to perform "the tasks necessary to an orderly transition";[96] and (2) "the time necessary to migrate to alternative fiber arrangements."[97] In past Orders, this Commission has held that the FCC "signaled an expectation that the parties will move expeditiously away from the specified UNE framework" and "encouraged the State commissions to monitor this area closely to ensure

---

[95] In addition to these disputes, BellSouth and the CLECs dispute which wire centers in South Carolina are not impaired pursuant to the FCC's impairment tests. BellSouth addresses which wire centers satisfy the test in its discussion of Issue 5, not Issue 2. BellSouth also discusses CompSouth's erroneous fiber-based collocation definition in its discussion of Issue 4.

[96] *TRRO* at ¶ 143 (DS1/3 transport); ¶ 196 (DS1/3 loops); ¶ 227 (local switching).

[97] *TRRO* at ¶ 144 (dark fiber transport); ¶ 198 (dark fiber loops). Tipton Direct at 5 – 6.

that parties do not engage in unnecessary delay."[98] This Commission clearly informed the CLECs that it "plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC."[99]

The Commission further finds that once CLECs have migrated from UNEs to alternative serving arrangements, the rates, terms, and conditions of such alternatives apply. The *TRRO* specifically states that the transition rates will apply only while the CLEC is leasing the de-listed element from the ILEC during the relevant transition period.[100] The transition rates will thus apply until the earlier of March 10, 2006 (or September 10, 2006 for dark fiber), or the date the de-listed UNEs are converted to the alternative arrangements ordered by the CLEC.[101]

1. Local Switching and UNE-P

In establishing transitional language, the Commission will require CLECs to identify their embedded base via spreadsheets and submit orders as soon as possible, but in no event more than 15 days after the date of this Order, to convert or disconnect their embedded base of UNE-P or standalone local switching.[102] This will give BellSouth time to work with each CLEC to ensure all embedded base elements are identified, negotiate project timelines, issue and process service orders, update billing records, and perform all necessary cutovers. If a CLEC fails to submit orders to convert UNE-P lines to alternative arrangements in a timeframe that allows the orders to be completed by March 10, 2006, BellSouth is authorized to convert

---

98 *Order Addressing Petition for Emergency Relief,* Order No. 2005-247 Docket No. 2004-316-C at p.11, ¶5 (Aug. 1, 2005).

99 *Id.*

100 *See TRRO* at ¶¶ 145, 198 and 228.

101 *Id.*

102 This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

remaining UNE-P lines to the resale equivalent no later than March 11, 2006. For any remaining stand-alone switch ports, BellSouth is authorized to disconnect these arrangements no later than March 11, 2005, as there is no other tariff or wholesale alternative for stand-alone switch ports.

The Commission finds that the transition plan also must include the transitional rates contained in the FCC's rules.[103] These rules make clear that transitional switching rates would be determined based on the higher of the rate the CLEC paid for that element or combinations of elements on June 15, 2004, or the rate the State commission ordered for that element or combination of elements between June 16, 2004 and the effective date of the *TRRO*.[104] In most, if not all instances, the transitional rate will be the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the transitional additive ($1 for UNE-P/Local Switching). For UNE-P, this includes those circuits priced at market rates for the FCC's four or more line carve-out established in the *UNE Remand Order* and affirmed in the *TRO,* n. 1376. To the extent that contracts include a market based price for switching for "enterprise" customers served by DS0 level switching that met the FCC's four or more line carve-out, these terms and rates were included in the interconnection agreements and were in effect on June 15, 2004.[105]

The Commission rejects the CLECs' suggestion that TELRIC rates plus $1 apply to such customers, as the FCC was very clear that for the embedded base of UNE-Ps, the CLECs would pay either the higher of the rates that were in their contracts as of June 15, 2004, or the rates that the State commissions had established between June 16, 2004 and the effective date of the

---

103 *See* 47 C.F.R. 51.319(d)(2)(iii).

104 Tr. at 349.

105 Although BellSouth has the legal right to the transitional additive in addition to the rate in existing interconnection agreements (Tr. at 349 (Tipton Rebuttal at 6); 47 C.F.R. § 51.319(d)(2)(iii)), BellSouth has elected not to apply the additional $1 to previously established market rates for switching.

TRRO, plus $1.[106] The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 4.2, 4.4.2, and 5.4, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

3. DS1 and DS3 High Capacity Loops and Dedicated Transport

For unimpaired wire centers where the FCC's competitive thresholds are met[107] or impaired wire centers where the FCC's caps apply,[108] the Commission will require CLECs to submit spreadsheets as soon as possible, but in no event more than 15 days after the date of this Order, identifying the embedded base and excess DS1 and DS3 loops and transport circuits to be disconnected or converted to other BellSouth services.[109]

If a CLEC does not provide notice in a timely manner to accomplish orderly conversions by March 10, 2006, BellSouth is authorized to convert any remaining embedded or excess high capacity loops and interoffice transport to the corresponding tariff service offerings. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.4 and 6.2, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

---

[106] *Id.*

[107] The identification and discussion of the wire centers that satisfy the FCC's competitive thresholds is addressed in relation to Issue 4.

[108] BellSouth and other active parties have agreed that the DS1 transport cap applies to routes for which there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport.

[109] This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

4. Dark Fiber Loops and Dedicated Transport

The Commission will require CLECs to submit spreadsheets to identify their embedded base dark fiber to be either disconnected or converted to other services by June 10, 2006.[110] If CLECs do not submit orders in a timely manner so that conversions can be completed by September 11, 2006, BellSouth is authorized to convert any remaining dark fiber loops or embedded base dark fiber transport to corresponding tariff service offerings. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.8.4 and 6.9.1, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

5. Transition Rates, Term, and Conditions

The Commission finds that it is appropriate to take steps in addition to requiring CLECs to identify their embedded base of customers and adopting timely and orderly steps to effectuate the transition from UNEs to alternative services. The Commission addressed the question of the embedded base in its "No New Adds" order. [111] CLECs that added new local switching arrangements, UNE-P arrangements, high capacity loops, or high capacity transport in unimpaired wire centers or in excess of the caps for their customers existing as of March 11, 2005 will be considered part of the embedded base. CLECs must transition these arrangements by the end of the transition period unless a CLEC and BellSouth negotiate different language.

[110] This deadline applies unless a CLEC and BellSouth agree to a different time frame.

[111] *See South Carolina No New Adds Order,* p. 3; Tr. at 276.

The Commission rejects CompSouth's proposed language that would allow CLECs to add other delisted UNEs during the transition period.[112]

As explained above in connection with switching, the transition rate is the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the FCC's prescribed transitional additive for that particular element.[113] For UNE switching, the additive is $1.00.[114] For UNE high capacity loops and transport, the additive is 15% of the rate paid (*i.e.,* a rate equal to 115% of the rate paid as of June 15, 2004).[115] Transition period pricing applies for each de-listed UNE retroactively to March 11, 2005.[116] Facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon amendment of the interconnection agreements.[117] The transition rates will not go into effect without a contract amendment but once the agreement is amended, the transition rate must be trued-up to the March 11, 2005 transition period start date.[118] The transition rates apply only while the CLEC is leasing the de-listed element from BellSouth during the transition period.[119] Once the de-listed UNE is converted to an alternative service, the CLEC will be billed the applicable rates for that alternative service going forward.[120]

CompSouth suggests that its members are entitled to transitional rates through March 10, 2006 even if they convert to alternative arrangements before that date. The Commission

---

112 Tr. at 358.
113 Tr. at 349.
114 *Id.*
115 *Id.*
116 *Id.* at 354.
117 *TRRO* n. 408, 524, 630.
118 *Id.*
119 Tr. at 354.
120 *Id.* at 355.

disagrees.[121] This decision is consistent with a decision of the Illinois Commerce Commission, which found:

> The Commission disagrees with CLECs that the transition rate should remain in effect for the entire transition period, even if transition is completed before the deadline. The terms of an agreement go into effect at the time the agreement say it does . . . Once the transition has been completed, the agreement takes over with all of its rate, terms, and conditions. The transition rates default only to those UNEs that have not transitioned to an alternate service arrangement.
>
> The Commission does not see how the imposition of agreement rates prior to the expiration of the deadline would somehow adversely affect an otherwise orderly transition. CLECs' argument, that SBC would have the incentive to overstate and exaggerate implementation challenges so as to convert as many UNEs as early as possible, defies logic.[122]

B. <u>Issue 3: Modification and Implementation of Interconnection Agreement Language:</u> *(a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?*

In its *TRRO*, the FCC directed that carriers "implement changes to their interconnection agreements consistent with [the FCC's] conclusions [in the *TRRO*]."[123] Accordingly, carriers must execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. Over 99 CLECs in South Carolina have amended or entered into new interconnection agreements to implement the changes in law that are the subject of this proceeding.[124] The Commission hereby orders all CLECs that have not yet executed a *TRO*- and *TRRO*-compliant amendment to their interconnection agreement to execute an amendment

---

[121] CompSouth's members and BellSouth are free to agree to such an arrangement, but CompSouth's members cannot compel BellSouth to enter such an arrangement.

[122] Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision,* November 2, 2005, p. 78. BellSouth acknowledges that other State commissions have reached different results on this issue.

[123] *TRRO* at ¶ 233.

[124] Tr. at 113-114 (Blake Reb. at 4-5).

with Commission-approved contract language promptly following issuance of the Commission's Order approving such language.

Further, the Commission finds that its decisions in this generic docket will apply to interconnection agreements that currently are the subject of arbitrations proceedings before the Commission. Proceeding in this manner is most efficient in that the Commission will have to address a given issue only once (which is one reason the Commission opened this generic docket rather than addressing these issues on a case-by-case basis). The same rationale applies to agreements that are being negotiated, but for which no arbitration has yet been filed.[125]

Finally, the Commission is aware that some CLECs have not negotiated with BellSouth in any form or fashion.[126] CLECs cannot circumvent binding federal law through inaction. The Commission orders all CLECs to execute contract amendments or execute new agreements within 45 days of this order, unless BellSouth and the CLEC mutually agree to a different timeframe. If amendments are not executed within this timeframe or the agreed-upon timeframe, the language approved in this order will go into effect regardless of whether an amendment or new contract is executed.

---

[125] In prior pleadings in this docket (but not in testimony), NuVox and Xspedius have contended that as a result of their "abeyance agreement" with BellSouth, they should not be required to amend their current interconnection agreements with BellSouth to incorporate the *TRRO* or the Commission's decisions in this generic proceeding. The Commission previously has rejected this argument, *see Order Addressing Petition for Emergency Relief,* Order No. 2005-247 Docket No. 2004-316-C at 5 (Aug. 1, 2005), and it hereby re-affirms its rejection of that argument.

[126] Tr. at 162-163.

C. Issue 4: High Capacity Loops and Dedicated Transport: *What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined: (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route?*

The Commission finds that the federal rules and any definitions in them should be incorporated into interconnection agreements. To the extent that terms (such as "building") are not defined in those rules, the Commission finds that any disputes regarding the definition of such terms should be addressed on a case-by-case basis and in the context of the actual facts involved in any such dispute. The Commission believes that this approach will lead to better results than any attempt to define such terms in a vacuum.

The Commission rejects CompSouth's proposed fiber-based collocator language because it is not consistent with the applicable FCC rule. That rule, in its entirety, states as follows:

> Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

CompSouth's proposed language improperly adds the following language to the federal definition:

> For purposes of this definition: (i) carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same, will be treated as affiliates and therefore as one collocator; provided, however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement shall ***not*** be counted as a Fiber-Based Collocator, (ii) a Comparable transmission Facility means, at a minimum, the provision of transmission capacity equivalent to fiber-

> optic cable with a minimum point-to-point symmetrical data capacity exceeding 12 DS3s; (iii) the network of a Fiber-Based Collocator may only be counted once in making a determination of the number of Fiber-Based Collocators, notwithstanding that such single Fiber-Based Collocator leases its facilities to other collocators in a single wire center; provided, however, that a collocating carrier's dark fiber leased from an unaffiliated carrier may only be counted as a separate fiber-optic cable from the unaffiliated carrier's fiber if the collocating carrier obtains this dark fiber on an IRU basis.[127]

One of the problems with CompSouth's proposed language it that it would require BellSouth to count AT&T and SBC as one fiber-based collocator, rather than as separate fiber-based collocators. The *TRRO*, however, has a precise effective date and, as of that date, AT&T and SBC were separate entities. The FCC set forth its tests to measure the amount of competition present in a given wire center at a given time, and as of the March 10, 2005 effective date of the *TRRO,* AT&T and SBC were not affiliated companies.[128] Indeed, State commissions that have been faced with this issue declined to count Verizon and MCI, or SBC and AT&T, as one entity.[129]

The Commission also rejects CompSouth's proposed language about counting the network of fiber-based collocators separately. It makes sense that a CLEC purchasing fiber from another CLEC can qualify under the federal definition. If one CLEC purchases fiber from another, has terminating fiber equipment, and can use the fiber it purchases to transport traffic in and out of a wire center, it qualifies. CompSouth's proposed definition ignores this reality, and

---

[127] First Revised Exhibit JPG-1, p. 17.

[128] BellSouth also counts KMC as a fiber-based collocator as of the effective date of the *TRRO.* In South Carolina, KMC's fiber-based collocation arrangements were purchased by TelCove, and TelCove has confirmed that it is a fiber-based collocator in the locations in which BellSouth identified KMC.

[129] *See Rhode Island Order* at 12 – 13; *see also* Order, p. 11, Case No. U-14447, Michigan Public Service Commission, Sept. 20, 2005 ("[i]n the Commission's view, the federal rules do not support the Joint CLECs' position. Contrary to their arguments, the Commission is not free to rewrite the FCC's rules, to improve upon them, or ignore them when arbitrating interconnection agreement terms.") ("Michigan Order").

has the potential to lead to gaming. For example, a CLEC or other party could agree to purchase all of the collocation arrangements in a given wire center for some nominal sum, then lease this space back to the previous owners for a paltry amount in exchange for a percentage of the savings the former owners will accrue by paying cost-based UNE rates instead of special access rates. The Commission does not believe this is what the FCC intended when it adopted its rule.

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.8, 2.1.4, 2.3, 2.8.4, 6.2-6.7, and 6.9 shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

D. **Issue 5: Unimpaired Wire Centers:** *(a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate? (b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport? (c) What language should be included in agreements to reflect the procedures identified in (b)?*

Relevant Contract Provisions: PAT-1 Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8; PAT-2 Sections 2.1.4.2.1, 2.1.4.2.2, 2.1.4.4, 2.1.4.5, 5.2.2.1, 5.2.2.2, 5.2.2.4, 5.2.2.5

1. State Commission Authority

Pursuant to *USTA II,* the FCC may not delegate impairment decisions to State commissions.[130] State commissions, however, are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO*.[131] As a practical matter, therefore, the Commission must resolve the parties' disputes concerning the wire centers that meet the FCC's impairment tests so that all

130 *USTA II* at 574.
131 *TRRO* at ¶ 234.

parties have a common understanding of the wire centers from which CLECs must transition former UNEs to alternative arrangements.[132]

2. South Carolina Wire Centers that Currently Satisfy the FCC's Impairment Tests

For the reasons set forth below, the Commission finds that the following BellSouth wire centers in South Carolina satisfy the FCC's impairment tests:[133]

		Transport		High Capacity Loops	
Wire Center	**Total Business Lines**	**Tier 1**	**Tier 2**	**No Impairment for DS3**	**No Impairment for DS1**
CHTNSCDT	24,703	X			
CHTNSCNO	24,107		X		
CLMASCSA	13,939		X		
CLMASCSN	48,403	X		X	
GNVLSCDT	45,546	X		X	
GNVLSCWR	33,639		X		
MNPLSCES	24,061		X		
SPBGSCMA	22,796		X		

The Commission, therefore, orders CLECs to transition existing Section 251 loops and transport (as applicable) in the wire centers listed above to alternative serving arrangements. The Commission further finds that CLECs have no basis to "self-certify" to obtain Section 251 loops and transport in the future in the wire centers above (as applicable).

The dispute between BellSouth and the CLECs over these wire centers concerns the application of the FCC's rule defining business lines.[134] There are two aspects to this dispute. The first is BellSouth's inclusion of certain UNE loops, and the second is BellSouth's treatment

---

132 Tr. at 299-300.

133 Hearing Exh. 9; *also* Tr. at 302-306, 307-308, *and* PAT-4.

134 *See* 47 C.F.R. § 51.5.

of high capacity loops. The Commission finds that BellSouth properly implemented the applicable federal law with regard to both of these aspects of the dispute.

With respect to the inclusion of certain UNE loops, the *TRRO* clearly requires BellSouth to include business UNE-P.[135] BellSouth did so,[136] it did not include residential UNE-P,[137] and the CLECs have not suggested that BellSouth should have included residential UNE-P. Moreover, the text of the FCC's definition of "business line" calls for the inclusion of "***all*** UNE loops,"[138] and BellSouth included all UNE loops in its count (i.e. those loops offered as stand-alone loops or in combination with dedicated interoffice transport). The CLECs apparently take issue with this, arguing that in doing so, BellSouth has wrongly included some UNE loops that serve residential customers in its count of business loops.

The Commission finds that BellSouth's count is appropriate. The federal rule requires the

> number of business lines in a wire center [t]o equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements.[139]

The FCC intentionally required all UNE loops (excepting residential UNE-P) to be included, because doing so gauges "the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs."[140] Moreover, while the CLECs argue that some residential UNE loops may have been mistakenly included in BellSouth's count, their witness Mr. Gillan conceded that he did not think it was

---

135 *TRRO* at ¶ 105.
136 Tr. at 303.
137 Tr. at 368.
138 47 C.F.R. §51.5 (emphasis added).
139 47 C.F.R. § 51.5
140 *TRO* at ¶ 105.

worth "correcting" BellSouth's business line count to exclude residential DSO loops because "it's such a small number … trying to go in to do it correctly wouldn't be worth it." [141] Mr. Gillan also acknowledged that BellSouth has no way of determining whether a given DSO loop is being used to provide business service or residential service.[142] Finally, if the Commission were to disregard completely some portion, estimate, or percentage of UNE loops, it would ignore the "opportunity" present in a particular wire center.

The CLECs also suggest that the Commission should undertake some calculation or estimate to capture "switched" UNE loops. CLEC witness Mr. Gillan, however, concedes there is no source that would provide data concerning which UNE loops are switched as compared to loops that are not switched.[143] Moreover, the FCC clearly intended to capture, with its business line test, an accurate measurement of the revenue opportunity in a wire center.[144] This intent is consistent with the revised impairment standard the FCC adopted in the *TRRO*, which considers, in part, whether requesting carriers can compete without access to particular network elements[145] and requires consideration of all the revenue opportunity that a competitor can reasonably expect to gain over facilities it uses, from all possible sources.[146] Finally, the FCC was very clear that it wished to avoid a "complex" test, or a test that would be subject to "significant latitude."[147] The Commission, therefore, declines to undertake the calculation or estimate suggested by the CLECs. This is consistent with decisions reached by the Illinois and Michigan Commissions.[148]

---

141 Gillan Deposition at 43.

142 *Id.*

143 Tr. at 543; Gillan Deposition at 44.

144 *TRRO* at ¶ 104.

145 *TRRO* at ¶ 22.

146 *Id.* at 24.

147 *TRRO,* ¶ 99

148 Illinois Commerce Commission Docket No. 05-0442, Arbitration Decision, November 2, 2005, p. 30; In re: Commission's own Motion to Commence a Collaborative

Additionally, the federal rule requires ISDN and other digital access lines, whether BellSouth's lines or CLEC UNE lines, to be counted at their full system capacity; that is, each 64 kbps-equivalent is to be counted as one line.[149] The FCC's rule plainly states that "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'"[150] The FCC has made clear its "test requires ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one."[151] On cross-examinations, Mr. Gillan conceded that "[t]here's no question that there's the potential for 24 lines in DS1."[152] Despite this recognition, however, Mr. Gillan urges the Commission not to consider the potential customers CLECs can serve. The Commission, however, finds that it is appropriate to consider the potential customers CLECs can serve.

3. Identifying Wire Centers in the Future that Satisfy the FCC's Impairment Tests

CompSouth has proposed a means for identifying future wire centers that would resolve disputes relating to BellSouth's subsequent wire center identification within ninety days after BellSouth's initial filing.[153] BellSouth has objected to any process that limits its right to designate future wire centers on an annual basis, and the Commission finds nothing in the federal rules that supports any such limitation. Moreover, CompSouth's proposed process inserts a number of qualifications to the data that it seeks from BellSouth, and the Commission

---

Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon, 2005 Mich. PSC LEXIS 310, Order at * 13.

[149] 47 C.F.R. § 51.5.

[150] *Id.*

[151] *See* Sept. 9, 2005, Br. for the FCC Respondents, United States Court of Appeals, D.C. Cir. No. 05-1095.

[152] SC. Tr. at 543.

[153] Tr. at 442-443.

can find no basis in the applicable law for such qualifications. The Commission, therefore will not adopt the CLECs' proposed language.

Under BellSouth's proposal, if wire centers are later found to meet the FCC's no impairment criteria, BellSouth will notify CLECs of these new wire centers via a Carrier Notification Letter. The non-impairment designation will become effective ten business days after posting the Carrier Notification Letter. Beginning on the effective date, BellSouth would no longer be obligated to offer high capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the self-certification process. This means that if a CLEC self certifies, BellSouth will process the order, subject to its right to invoke the dispute resolution process if BellSouth believes the self certification is invalid. High capacity loop and transport UNEs that were in service when the subsequent wire center determination was made will remain available as UNEs for 90 days after the effective date of the non-impairment designation. This 90 day period is referred to as the "subsequent transition period." No later than 40 days from effective date of the non-impairment designation, affected CLECs must submit spreadsheets identifying their embedded base UNEs to be converted to alternative BellSouth services or to be disconnected. From that date, BellSouth will negotiate a project conversion timeline that will ensure completion of the transition activities by the end of the 90-day subsequent transition period.

The Commission finds that BellSouth's proposal is reasonable and in compliance with applicable law. Moreover, BellSouth's proposal has been agreed to with a number of CLECs.[154] The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this

[154] Tr. at 113.

Order, including without limitation Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

E. **Issue 9: Conditions Applicable to the Embedded Base** *What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?*

This Commission addressed this issue in its *South Carolina No New Adds Order.* Nothing in the record suggests that BellSouth is not complying with that order. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 5.4.3.2, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

F. **Issue 10: Transition of De-listed Network Elements To Which No Specified Transition Period Applies:** *What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?*

The Commission has addressed the rates, terms and conditions for elements de-listed by the *TRRO* and which have a designated transition period, including those identified in subpart (b) above, in connection with its discussion of Issue 2. In addition to taking steps to transition away from elements de-listed by the *TRRO,* the FCC removed significant unbundling obligations in the *TRO,* including, entrance facilities, enterprise or DS1 level switching, OCN loops and

transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching.[155]

The FCC eliminated the ILECs' obligation to provide unbundled access to these elements 2 years ago in the *TRO*. CLECs that still have the rates, terms and conditions for these elements in interconnection agreements have reaped the benefits of unlawful unbundling of these elements for far too long.[156] As such, with the exception of entrance facilities, which BellSouth will agree to allow CLECs to transition with their embedded base and excess dedicated transport, BellSouth is authorized to disconnect or convert such arrangements upon 30 days written notice, absent a CLEC order to disconnect or convert such arrangements.[157] BellSouth should also be permitted to impose applicable nonrecurring charges.[158] To do otherwise would provide an incentive for these CLECs to further delay implementation of the *TRO*.

BellSouth's proposed contract language is fully consistent with the *TRO*. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.7 and 4.1, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

---

155 Tr. at 313.
156 *Id*.
157 Tr. at 314.
158 *Id*.

G. Issue 11: UNEs That Are Not Converted: *What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?*

The *TRRO* requires CLECs to transition their entire embedded base of switching and high capacity loops and transport by March 10, 2006.[159] To accomplish this, and to minimize disruption to end users, BellSouth obviously needs CLECs to timely provide it with information concerning their plans for these services. The Commission has reviewed BellSouth's proposals and finds them to be reasonable.

BellSouth is asking CLECs to identify their embedded base UNE-Ps as soon as possible and to submit orders to disconnect or convert the embedded base in a timely manner so as to complete the transition process by March 10, 2006.[160] If CLECs fail to submit orders in a timely manner, BellSouth should be permitted to identify all such remaining embedded base UNE-P lines and convert them to the equivalent resold services no later than March 10, 2006, subject to applicable disconnect charges and the full nonrecurring charges in BellSouth's tariffs.[161] Absent a commercial agreement for switching, BellSouth is authorized to disconnect any stand alone switching ports which remain in place on March 11, 2006.[162] To do otherwise will incent CLECs to simply refuse to act in order to delay implementation of the *TRRO* by the FCC's deadline.

For high capacity loops and dedicated transport, BellSouth is requesting CLECs submit spreadsheets by December 9, 2005 or as soon as possible to identify and designate transition

---

159 Tr. at 315-316.
160 Tr. at 316.
161 *Id.*
162 *Id.*

plans for their embedded base of these de-listed UNEs.[163] The Commission will require CLECs to do so as soon as possible, but in no event more than 15 days after the date of this Order.[164] If CLECs fail to comply with this requirement, BellSouth is authorized to identify such elements and transition such circuits to corresponding BellSouth tariffed services no later than March 10, 2006, subject to applicable disconnect charges and full nonrecurring charges in BellSouth's tariffs.[165]

For dark fiber, BellSouth is requesting that CLECs submit spreadsheets to identify and designate plans for their embedded base dark fiber loops and de-listed dark fiber transport to transition to other BellSouth services by June 10, 2006.[166] If a CLEC fails to submit such spreadsheets, BellSouth is authorized to identify all such remaining embedded dark fiber loops and/or de-listed dark fiber dedicated transport and transition such circuits to the corresponding BellSouth tariffed services no later than September 10, 2006, subject to applicable disconnect charges and full nonrecurring charges set forth in BellSouth's tariffs.[167]

BellSouth's proposed contract language is fully consistent with the *TRO*. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 4.2.5, 4.2.6, 5.4.3.5, 5.4.3.6, 2.1.4.11, 2.8.4.7, 6.2.6.9, 6.9.1.9, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

---

[163] Tr. at 317.

[164] This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

[165] Tr. at 317-318.

[166] *Id.*

[167] *Id.*

H. Issue 32: Binding Nature Of Commission Order: *How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?*

The Commission intends that unless they agree otherwise, BellSouth and all CLECs operating in South Carolina promptly execute contractual amendments to incorporate the language the Commission adopts in this proceeding so that the FCC's transitional deadlines are met. These amendments must be executed no more than 45 days after the date of this Order. If an amendment is not executed within the allotted timeframe, the Commission's approved language will go into effect for all CLECs in the state of South Carolina, regardless of whether an amendment is signed.[168]

III. Service-Specific Issues (13, 15, 16, 29, 31)

A. Issue 13: Performance Plan: *Should network elements de-listed under Section 251(c)(3) be removed from the SQM/PMAP/SEEM?*

In deciding this issue, the Commission first notes that the Georgia Commission recently entered an *Order Adopting Hearing Officer's Recommended Order*, dated June 23, 2005, in Docket No. 7892-U, in which it approved a Stipulation Agreement reached between BellSouth and several CLEC parties. This stipulation provides, in part:

> 1. All DS0 wholesale platform circuits provided by BellSouth to a CLEC pursuant to a commercial agreement are to be removed from the SQM Reports; Tier 1 payments; and Tier 2 payments starting with May 2005 data.
>
> 2. The removal of DS0 wholesale platform circuits as specified above will occur region-wide.
>
> 3. All parties to this docket [the Performance Measurements docket] reserve the right to make any arguments regarding the removal of any items other than the DS0 wholesale platform circuits from

[168] The Commission notes also that it has previously addressed the "Abeyance Agreement" between BellSouth and CompSouth members Nuvox and Xspedius in its No New Adds Order, and that all CLECs including Nuvox and Xspedius must promptly execute amendments consistent with this order.

> SQM/SEEMs in Docket No. 19341-U [the Generic Change of Law docket] to the extent specified in the approved issues list.[169]

This regional Stipulation was endorsed by a number of CLECs, including AT&T, Covad, MCI and DeltaCom, all of whom are CompSouth member.

Although this Stipulation is not binding on all parties to this docket, it supports the Commission's finding that elements that are no longer required to be unbundled pursuant to Section 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan. The SQM/PMAP/SEEM plan was established to ensure that BellSouth would continue to provide nondiscriminatory access to elements required to be unbundled under Section 251(c)(3) after BellSouth gained permission to provide in-region interLATA service. If BellSouth fails to meet measurements set forth in the plan, it must pay a monetary penalty to a CLEC and/or to the State. Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLECs to provide service and without access to the ILEC's network, the CLEC would be impaired in its ability to do so.

In determining that certain elements are no longer "necessary" and that CLECs are not "impaired" without access to them, the FCC found that CLECs were able to purchase similar services from other providers. These other providers are not required to perform under a SQM/PMAP/SEEM plan. To continue to impose upon BellSouth a performance measurement, and possible penalty, on competitive, commercial offerings is discriminatory and anticompetitive. For commercial offerings, the marketplace, not a SQM/PMAP/SEEM plan, becomes BellSouth's penalty plan. If BellSouth fails to meet a CLEC's provisioning needs, such CLEC can avail itself of other providers of the service and BellSouth is penalized because it losses a customer and associated revenues.[170]

The Commission, therefore, finds that network elements that are de-listed under Section 251(c)(3) should be removed from the SQM/PMAP/SEEM.

---

169 Tr. at 104.

170 Tr. at 102-104.

B. Issue 15: Conversion of Special Access Circuits to UNEs: *Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?*

Mr. Gillan did not file any direct or rebuttal testimony addressing Issue 15.[171] BellSouth, on the other hand, explained that it will convert special access services to UNE pricing, subject to the FCC's service eligibility requirements and limitations on high-cap EELs, once a CLEC's contract has these terms incorporated in its contract.[172] BellSouth also presented testimony that it will convert UNE circuits to special access services and that special access to UNE conversions should be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangements.[173] BellSouth presented evidence that the applicable rates for conversions in South Carolina for the first single DS1 or lower capacity loop conversion should be $24.88 and $3.51 per loop for additional conversions on that LSR and $26.37 for projects consisting of 15 or more loops submitted on a spreadsheet and $4.99 for each additional loop on the same LSR.[174] For DS3 and higher capacity loops and for interoffice transport conversions, BellSouth presented evidence that the rate should be $40.27 for the first single conversion on an LSR and $13.52 per loop for additional single conversions on that LSR.[175] For a project consisting of 15 or more such elements in a state submitted on a single spreadsheet, BellSouth is proposing $64.07 for the first loop and $25.63 for each additional loop conversion on the same spreadsheet.[176] Finally, BellSouth presented evidence that the Commission-ordered rate of $5.61 should apply for EEL conversions, until new rates are

[171] Gillan Deposition at 77.
[172] Tr. at 327.
[173] *Id*.
[174] Tr. at 328.
[175] Tr. at 328.
[176] Tr. at 328.

issued[177] and that if physical changes to the circuit are required, the activity should not be considered a conversion and the full nonrecurring and installation charges should apply.[178]

Based on the evidence presented by BellSouth and the lack of evidence presented by the CLECs, the Commission adopts BellSouth's proposed language. The Commission notes that nothing precludes BellSouth from offering conversions at rates lower than those specified in this Order. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.6 and 1.13, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

C. **Issue 16: Pending Conversion Requests:** *What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?*

Relevant Contract Provisions: Neither BellSouth nor CompSouth propose specific language on this issue. The parties' dispute concerns CLECs' unfounded claims for retroactive conversion rights. *See* BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

Mr. Gillan did not file any direct testimony addressing Issue 16.[179] In his rebuttal testimony, Mr. Gillan claimed that conversion language and rights must be retroactive to March 11, 2005, the effective date of the *TRRO.*[180] This Commission disagrees, because retroactive conversion rights were not contemplated in the *TRO.* Instead, the FCC made clear that "carriers [were] to establish any necessary timeframes to perform conversions in their interconnection

[177] *Id.*
[178] *Id.*
[179] Gillan Deposition at 77.
[180] Tr. at 515.

agreements or other contracts."[181] This is the conclusion the Massachusetts and Rhode Island commissions reached when confronted with this issue.[182]

The Commission, therefore, finds that Mr. Gillan's testimony on this issue is incorrect and that it is inconsistent with the *TRO* and the *TRRO.* The contract language contained in a CLEC's interconnection agreement at the time the *TRO* became effective governs the appropriate rates, terms, conditions and effective dates for conversion requests that were pending on the effective date of the TRO.[183] Conversion rights, rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended.[184]

D. Issue 29: Enhanced Extended Link ("EEL") Audits: *What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO*?

The essential dispute between the parties is that CompSouth claims that BellSouth must show cause to the CLEC before it can begin an audit.[185] The Commission, however, is concerned that this requirement could be used by certain CLECs to delay or even evade an appropriate audit. Additionally, an audit often is necessary in order to determine whether there is or is not cause for concern.

---

[181] *TRO* at ¶ 588.

[182] *See Massachusetts Arbitration Order,* p. 135; *see also Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 30 ("Paragraph 589 [of the *TRO*] does not contain any clear FCC mandate that pricing for conversions begin on the effective date of the *TRO,* which was October 2, 2003. Accordingly, the pricing for these conversions does not take effect until the ICA amendment goes into effect").

[183] Tr. at 329, 377-378.

[184] *Id.*

[185] Gillan Deposition at 84.

Moreover, BellSouth's witness Ms. Tipton explained that BellSouth would not audit without cause,[186] and the fact that BellSouth's proposed language calls for BellSouth to pay for an audit that does not reveal issues is a deterrent to BellSouth's unreasonably requesting an audit. BellSouth's proposed language allows it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria, and requires BellSouth to obtain and pay for an independent auditor who will conduct the audit pursuant to American Institute for Certified Public Accountants ("AICPA") standards.[187] The auditor determines material compliance or non-compliance.[188] If the auditor determines that CLECs are not in compliance, the CLECs are required to true-up any difference in payments, convert noncompliant circuits, and make correct payments on a going-forward basis.[189] Also, CLECs determined by the auditor to have failed to comply with the service eligibility requirements must reimburse the ILEC for the cost of the auditor.[190]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 5.3.4.3, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

---

[186] TRA Docket No. 04-00381, Transcript of proceedings, Wednesday, September 14, 2005, Vol. III, pp. 239-240.

[187] Tr. at 334-335.

[188] *Id*.

[189] *Id.*

[190] *Id.*

E. Issue 31: *Core Forbearance Order*: *What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?*

Neither BellSouth nor CompSouth has proposed specific contractual language regarding the *Core Order*.[191] Thus, the only language before the Commission is the language proposed by ITC^DeltaCom, which suggests that BellSouth's template agreement should include language implementing the *Core Order.* The *Core Order*, however, provides CLECs with various choices that allow different CLECs to elect different rate structures.[192] Due to these choices, a one-size-fits-all approach is inappropriate.[193] As BellSouth witness Ms. Tipton explained, even if language addressing the *Core Order* were included in an agreement, the parties to each agreement still must identify their desired rate structure. Including standard language, therefore, would not address all scenarios encountered in the implementation of the *Core Order*.[194]

Accordingly, the Commission finds that BellSouth should resolve this issue on a carrier-by-carrier basis depending on the specific facts of each particular situation.

IV. Network Issues (6, 19, 23, 24, 26, 27, 28)

A. Issue 6: HDSL Capable Copper Loops: *Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?*

This issue presents two questions that require Commission resolution, and both of these questions relate specifically to BellSouth's UNE HDSL loop product, rather than to HDSL compatible loops generally. The first question is if, in the future, BellSouth satisfies the FCC's impairment thresholds for DS1 loops, would BellSouth be obligated to provide CLECs with its

---

191 *See* First Revised Exhibit JPG-1, p. 63.
192 Tr. at 341.
193 *Id.*
194 Tr. at 383.

UNE HDSL loop product? Second, can BellSouth count each deployed UNE HDSL loop as 24 voice grade equivalent lines?

Concerning the first question, the Commission finds that CLECs are not entitled to order UNE HDSL loops in wire centers that satisfy the FCC's thresholds for DS1 loop relief. This conclusion is explicitly supported by the FCC's definition of a DS1 loop. The FCC defined a DS1 loop as including "2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, such as 2-wire and 4-wire HDSL Compatible Loops."[195]

The CLEC witnesses ignore the FCC's definition of a DS1 loop and cite to FCC language addressing HDSL capable loops generally, rather than to the clear and unambiguous language contained in the rules.[196] The CLECs' position is misplaced because, by defining DS1 loops as including a 2-wire and 4-wire HDSL loops, the FCC expressly removed any obligation to provide these loops in unimpaired wire centers.[197]

In contrast, BellSouth's proposed language implements the applicable federal rules, which, by their terms, extend unbundling relief to UNE HDSL loops in the same wire centers in which BellSouth is not obligated to provide CLECs with DS1 loops. The Commission, therefore, adopts BellSouth's proposed language.

The second question posed by this issue relates to how UNE HDSL loops should be calculated in future determinations of wire centers that satisfy the FCC's impairment thresholds. The Commission finds that UNE HDSL loops can and should be counted as 24 business lines. In the *TRO* the FCC explained:

---

[195] 47 C.F.R. § 51, 319(a)(4); Fogle Rebuttal at 4.

[196] Tr. at 438.

[197] More importantly, however, the CLECs cannot refute the reality that there has been very little CLEC interest in BellSouth's UNE HDSL product at all, as only 358 UNE HDSL loops were in service to *all* CLECs in South Carolina as of August 2005.[197]

> We note throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. Carriers frequently use a form of DSL service, i.e., High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers. We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps.[198]

The FCC has also made clear that, for the purposes of calculating business lines, "a DS1 line corresponds to 24 kbps-equivalents, and therefore to 24 'business lines.'"[199] Since the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity, and since the FCC declared that UNE HDSL loops are used to deliver T1 services, it is obvious that BellSouth's UNE HDSL loops must be counted, for the purpose of determining business lines in an office, on a 64 kbps equivalent basis, or as 24 business lines.[200] BellSouth's proposed contract language is fully consistent with the FCC's decisions and thus is approved.

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 2.3.6.1, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

B. <u>Issue 19: Line Splitting:</u> *What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?*

No CLEC witness provided any testimony concerning line splitting, which occurs when one CLEC provides narrowband voice service over the low frequency portion of a loop and a second CLEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter.[201] In contrast, BellSouth's witness on this issue, Mr. Fogle,

---

198 *TRO,* n. 634 (emphasis supplied).

199 47 C.F.R. § 51.5.

200 Tr. at 210-211.

201 *TRO* at ¶ 251; *Line Sharing Reconsideration Order* at ¶ 33; Gillan Deposition at 77 – 78.

demonstrated the need for BellSouth's contract language, which involves a CLEC purchasing a stand-alone loop (the whole loop), providing its own splitter in its central office leased collocation space, and then sharing the portion of the loop frequency not in use with a second CLEC.[202]

CompSouth's language would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271. As set forth above, however, the Commission does not support the reincarnation of UNE-P and will not require any references to Section 271 in Section 251/252 interconnection agreements. Moreover, the loop described by CompSouth does not exist, is not required by the FCC, and, therefore, should not be included in the section of the ICA that addresses line splitting.[203]

CompSouth also proposes that BellSouth be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L. Mr. Fogle, however, made clear, splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter built into all Asynchronous Digital Subscriber Line ("ADSL") platforms.[204] The CLECs offered no contrary evidence. BellSouth should not be obligated to provide the CLECs with splitters when they are utilizing UNE-L and can readily provide this function for themselves.[205]

The final area of competing contract language concerns CompSouth's proposed OSS language. The dispute between the parties is not over the language contained in the federal rules – clearly, the federal rules require BellSouth to make modifications to its OSS necessary for line splitting. The dispute between the parties revolves around the modifications that are actually "necessary." The CLEC presented no evidence to suggest that it is necessary for BellSouth to provide them with anything in order to facilitate line splitting.

---

202 Tr. at 187-189.
203 Fogle Rebuttal at 8.
204 Tr. at 215.
205 Tr. at 215-216.

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 3, shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

C. Fiber and Broadband Unbundling:

1. Greenfield and Fiber To The Home

i. **Issue 23: Greenfield Areas:** *a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?*

ii. **Issue 28: Fiber To The Home:** *What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?*

There are essentially two disagreements regarding these issues. First, CompSouth wants to delete BellSouth's Section 2.1.2.3, which states:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval

CompSouth did not offer any explanation for its desire to delete this provision,[206] which appears reasonable on its face. The Commission, therefore, finds that this provision should appear in interconnection agreements.

The second disagreement largely centers on the extent of fiber unbundling. The core dispute relates to the following language that CompSouth wants to substitute for BellSouth's proposed Section 2.1.2.3:

> Notwithstanding the above, nothing in this Section shall limit BellSouth's obligation to offer CLECs an unbundled DS1 loop (or loop/transport combination) in any wire center where BellSouth is required to provide access to DS1 loop facilities.[207]

CompSouth argues that its limitation is supported by the FCC's use of the terms "mass market" at various places in its orders. The Commission, however, finds that CompSouth's proposed language should be rejected because it is not supported by binding federal rules.[208]

The FCC has addressed fiber relief in various orders. In the *TRO,* for instance, the FCC stated at ¶ 273:

> Requesting carriers are not impaired without access to FTTH loops, although we find that the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop. With a limited exception for narrowband services, our conclusion applies to FTTH loops deployed by incumbent LECs in both new construction and overbuild situations. Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loops must be unbundled for narrowband services only. Incumbent LECs do not have to offer unbundled access to newly deployed or "greenfield" fiber loops.

Although the FCC used the terms "mass market" at various other places in the *TRO,* it did not use those words in explaining the scope of its fiber relief, and the FCC was very clear that its

---

206 *See* SC TR at 220.
207 *See* First Revised Exhibit JPG-1, p. 53.
208 *See* 47 C.F.R. § 51.319(a)(3).

"unbundling obligations and limitations for such loops do not vary based on the customer to be served."[209] The FCC recognized clearly that CLECs "are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation."[210]

The FCC extended its fiber relief in subsequent orders. In its *Order on Reconsideration*, *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,[211] the FCC made clear that BellSouth is not required to unbundle fiber loops serving predominantly residential multiple dwelling units ("MDUs").[212] The FCC also explained that, to the extent fiber loops serve MDUs that are predominantly residential in nature, such loops are governed by the FTTH rules.[213] "General examples of MDUs include apartment buildings, condominium buildings, cooperatives, or planned unit developments."[214] The FCC further stated that the existence of businesses in MDUs does not exempt such buildings from the FTTH unbundling framework established in the *TRO*. For instance, the FCC stated that "a multi-level apartment that houses retail stores such as a dry cleaner and/or a mini-mart on the ground floor is predominantly residential, while an office building that contains a floor of residential suites is not."[215] In its concluding paragraphs, the FCC acknowledged that its rule "will deny unbundling to competitive carriers seeking to serve customers in predominantly residential MDUs" but

---

209 *TRO* at ¶ 210.

210 *TRO* at ¶ 275.

211 CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) ("*MDU Reconsideration Order*").

212 *MDU Reconsideration Order* at ¶ 7.

213 *Id.* at 4.

214 *Id.* at ¶ 4.

215 *Id.*

found that "such unbundling relief was necessary to remove disincentives for incumbent LECs to deploy fiber to these buildings."[216]

Following its *MDU Reconsideration Order,* the FCC next addressed the topic of fiber loops in its *Order on Reconsideration*, *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* ("*FTTC Reconsideration Order*").[217] The FCC defined a FTTC loop is a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises."[218] Then, the FCC granted further unbundling relief, concluding that "requesting carriers are not impaired in greenfield areas and face only limited impairment without access to FTTC loops where FTTC loops replace pre-existing loops."[219] Significantly, the FCC reiterated that CLECs have increased revenue opportunities available with FTTC loops and that the entry barriers for CLECs and ILECs were "largely the same."[220] The FCC again concluded that its rule modification "will relieve the providers of such broadband loops from unbundling obligations under Section 251 of the Act."[221]

CompSouth's proposed contract language would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. The Commission, therefore, finds that CompSouth's proposed language must be rejected because it is inconsistent with FCC's broadband policies, its fiber orders, and the applicable rule. This finding is consistent with decisions of the Michigan,[222] Massachusetts,[223] and Rhode Island[224] Commissions.

---

216 *Id.* at 23.
217 CC Docket No. 01-338, FCC 04-248 at ¶¶ 1, 9 (Oct. 18, 2004).
218 *FTTC Reconsideration Order* at ¶ 10.
219 *Id.* at 11.
220 *Id.* at 12.
221 *Id.* at 32.
222 *Michigan Order,* p. 6 – 7.
223 *Massachusetts Arbitration Order,* p. 177.

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.2, 2.1.2.1, 2.1.2.2, and 2.1.2.3 shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

2. **Issue 24: Hybrid Loops:** *What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?*

Relevant Contract Provisions: PAT-1 Section 2.1.3; PAT-2 Section 2.1.3

Hybrid loops are defined in the federal rules, and BellSouth and CompSouth do not appear to contest that it is appropriate to include the language contained in such rules in interconnection agreements, whether that language is a shortened version of the rules, as BellSouth proposes, or the federal definition in its entirety.[225] BellSouth, however, opposes CompSouth's proposed language that would require BellSouth to provide access to hybrid loops as a Section 271 obligation.[226] Consistent with its decisions above, the Commission rejects this language and adopts BellSouth's proposed language.

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.3 shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

---

[224] *Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 18.

[225] *See* PAT-1 and PAT-2.

[226] Tr. at 220-221.

D. Routine Network Modification Issues

1. **Issue 26:** *What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications*?

2. **Issue 27:** *What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?*

3. **SC Specific Issue:** (a) *How should Line Conditioning be defined in the Agreement? What should BellSouth's obligation be with respect to Line Conditioning?* (b*) Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less?* (c) *Under what rates, terms and conditioning should BellSouth be required to perform line conditioning to Revenue Bridge Taps?*

Relevant Contract Provisions: – PAT-1 Section 1.10; PAT-2 Section 1.10

The parties' dispute centers on the relationship between routine network modifications ("RNM") and line conditioning. BellSouth argues that line conditioning is subset of RNM,[227] and it opposes CompSouth's request to limit BellSouth's cost recovery to TELRIC rates, even if BellSouth performs work that it would not typically perform for its retail customers.

The FCC has defined RNMs as "those activities that incumbent LECs regularly undertake for their own customers."[228] RNMs do not include the construction of new wires (*i.e.* installation of new aerial or buried cable).[229] The FCC, citing the United States Supreme Court, has recognized an ILEC like BellSouth is not required to "alter substantially [its] network[] in order to provide superior quality interconnection and unbundled access."[230] Thus, an ILEC has to

---

227 *Id.* at 23-24.

228 *TRO* at ¶ 632.

229 *Id.*

230 *TRO* at ¶ 630 (quoting, *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997)).

make the same RNMs to their existing loop facilities for CLECs that they make for their own customers.[231] As stated by the FCC,

> [b]y way of illustration, we find that loop modification functions that the incumbent LEC routinely performs for their own customers, and therefore must perform for competitors, include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer.[232]

The FCC described these and other activities that would constitute RNMs as the "'routine, day-to-day work of managing an [incumbent LEC's] network.'"[233]

The D.C. Circuit in *USTA II* interpreted the FCC's RNM requirements in the *TRO*. The Court's analysis is consistent with BellSouth's position on this issue.

> The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. ***The FCC has established a clear and reasonable limiting principle: the distinction between a 'routine network modification' and a 'superior quality' alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for its own customers.*** While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be "nondiscriminatory.[234]

Clearly, the FCC draws no distinction between line conditioning and RNM. In paragraph 643 of the *TRO*, the FCC stated that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers."[235] The FCC went on further to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs

---

231 *TRO* at ¶ 633.
232 *Id.* at 634 (footnotes omitted).
233 *Id.* at 637.
234 *USTA II*, 359 F.3d at 578 (emphasis added).
235 *TRO* at ¶ 643.

provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their Section 251(c)(3) nondiscrimination obligations."[236]

In its discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*: "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules."[237] The FCC echoed these sentiments in paragraph 250 of the *TRO*:

> As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service.[238]

The Florida Commission recently addressed this issue, finding that that BellSouth's RNM and line conditioning obligations were to be performed at parity.[239] Under this ruling, BellSouth is not obligated, to remove at TELRIC rates, load coils on loops greater than 18,000 feet.[240] Likewise, the Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access.[241]

With respect to Issue 27, BellSouth's position is that if BellSouth is not obligated to perform a RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC, it is a commercial or tariffed rate.[242] In contrast, CompSouth's proposed language limits BellSouth's recovery to TELRIC rates, even if

---

236 *Id.*
237 *TRO* at ¶ 635.
238 *TRO* at ¶ 250.
239 *See* Order No. PSC-05-0975-FOF-TP at 24 – 26.
240 *Id.* at 36 – 37.
241 *Id.* at 41.
242 Tr. at 206.

the activity the CLEC is requesting was not included in the establishment of that rate.[243] The Commission finds that BellSouth's position is correct. If BellSouth performs non-standard modifications at the request of a CLEC, it is entitled to be compensated for doing so at rates other than TELRIC.

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.10 and 2.5 shall be included in interconnection agreements between BellSouth and CLECs operating in South Carolina.

BELLSOUTH TELECOMMUNICATIONS, INC.

_____

PATRICK W. TURNER
Suite 5200
1600 Williams Street
Columbia, South Carolina 29201
(803) 401-2900

R. Douglas Lackey
Andrew D. Shore
Meredith E. Mays
675 W. Peachtree Street, Suite 4300
Atlanta, GA 303075
(404) 335-0750

610976

[243] Tr. at 225.